

FILED
Court of Appeals
Division II
State of Washington
7/26/2022 3:40 PM

No. 56122-1-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY ANTEE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable John C. Skinder, Judge
The Honorable James J. Dixon, Judge
Cause No. 18-1-00331-34

BRIEF OF RESPONDENT

Joseph J.A. Jackson
Attorney for Respondent
2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

TABLE OF CONTENTS

A. <u>ISSUES PERTAINING TO ASSIGNMENTS OF ERROR</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
C. <u>ARGUMENT</u>	40
1. <u>The trial court did not abuse its discretion or violate the right to confrontation by admitting statements pursuant to the child hearsay statute, RCW 9A.44.120</u>	41
2. <u>Antee made no argument that statements were testimonial and there were no testimonial statements relied upon at trial, therefore, there can be no Confrontation Clause violation</u>	49
3. <u>Antee waived any Confrontation Clause argument with regard to statements made to Yearian and Wahl by failing to object to those statements and even if not waived, the statements were properly admissible under ER 803(a)(4)</u>	53
4. <u>In a light most favorable to the state, the evidence was sufficient to convict Antee of each count of sexual abuse</u>	56
D. <u>CONCLUSION</u>	59

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<u>In re Pers. Restraint of Grasso,</u> 151 Wn.2d 1, 84 P.3d 859 (2004).....	56
<u>State v. Beadle,</u> 173 Wn.2d 97, 111-112, 265 P.3d 863 (2011).....	45
<u>State v. Burns,</u> 192 Wn.2d 190, 438 P.3d 1183 (2019).....	49-51, 54
<u>State v. Camarillo,</u> 115 Wn.2d 60, 794 P.2d 850 (1990).....	57
<u>State v. Clark,</u> 139 Wn.2d 152, 985 P.2d 377 (1999),.....	46, 48
<u>State v. C.J.,</u> 148 Wn.2d 672, 63 P.3d 765 (2003).....	43-45
<u>State v. Delmarter,</u> 94 Wn.2d 634, 618 P.2d 99 (1980).....	57
<u>State v. Jones,</u> 112 Wn.2d 488, 772 P.2d 496 (1989).....	44
<u>State v. Kirkman,</u> 159 Wn.2d 918, 155 P.3d 125 (2007).....	50-51
<u>State v. Leavitt,</u> 111 Wn.2d. 66, 758 P.2d 982 (1988).....	42

<u>State v. Price,</u> 158 Wn.2d 630, 146 P.3d 1183 (2006).....	47-48
<u>State v. Rohrich,</u> 132 Wn.2d 472, 939 P.2d 697 (1997)	46-47
<u>State v. Ryan,</u> 103 Wn.2d 165, 691 P.2d 197 (1984).....	19, 42, 44
<u>State v. Salinas,</u> 119 Wn.2d 192, 829 P.2d 1068 (1992).....	57
<u>State v. Swan,</u> 114 Wn.2d 613, 790 P.2d 610 (1990).....	43-44
<u>State v. Wilcoxon,</u> 185 Wn.2d 324, 373 P.3d 224 (2016).....	52

Decisions Of The Court Of Appeals

<u>State v. Alvarez-Abrego,</u> 154 Wn. App. 351, 225 P.3d 396 (2010).....	52
<u>State v. Carlson,</u> 61 Wn. App. 865, 812 P.2d 536 (1991).....	43
<u>State v. Fisher,</u> 130 Wn. App.1, 15, 108 P.3d 1262 (2005), <i>review denied</i> , 156 Wn.2d 1013 (2006).....	56
<u>State v. Fraser,</u> 170 Wn. App. 13, 25-26, 282 P.3d 152 (2012).....	50
<u>State v. Galisia,</u> 63 Wn. App. 833, 822 P.2d 303 (1992).....	57

<u>State v. Kinzle,</u> 181 Wn. App. 774, 326 P.3d 870 (2014).....	48
<u>State v. O’Cain,</u> 169 Wn. App. 228, 279 P.3d 926 (2012).....	49-50
<u>State v. Pham,</u> 75 Wn. App. 626, 631, 879 P.2d 321 (1994).....	45
<u>State v. Walton,</u> 64 Wn. App. 410, 824 P.2d 533 (1992).....	57
<u>State v. Williams,</u> 137 Wn. App. 736, 154 P.3d 322 (2007).....	55
<u>State v. Young,</u> 62 Wn. App. 895, 802 P.2d 829 (1991).....	43

U.S. Supreme Court Decisions

<u>Crawford v. Washington,</u> 541 U.S. 36, 51, 124 S.Ct. 1354, 158 L.Ed 177 (2004).....	51
<u>Davis v. Washington,</u> 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006).....	52
<u>Lockhart v. Nelson,</u> 488 U.S. 33, 109 S. Ct. 285, 102 L. Ed. 2d 265 (1988).....	58
<u>Melindez-Dias v. Massachusetts,</u> 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed2d 314 (2009).....	49
<u>United States v. Owens,</u> 484 U.S. 554, 108 S.Ct. 838, 98 L.Ed. 2d 951 (1988).....	48

<u>Pennsylvania v. Ritchie,</u> 480 U.S. 39, 107 S. Ct. 989, 94 L.Ed.2d 40 (1987).....	41
---	----

Statutes and Rules

ER 803(a)(4).....	1-2, 52-53, 55-56, 58-59
RCW 9A.44.120.....	1-2, 18, 21, 41, 45, 48, 58-59
RAP 2.5.....	50, 54
RAP 18.17.....	60
Title 13.....	41

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court properly admitted statements of a child victim under RCW 9A.44.120 and whether those properly admitted statements violated the right to confront witnesses where the child testified at trial and was subject to cross examination.

2. Whether an alleged violation of the Confrontation Clause is waived where there is no argument that statements were testimonial and whether a violation of the Confrontation Clause can occur where statements that are elicited during trial are non-testimonial.

3. Whether any argument that statements admitted under ER 803(a)(4) violated the right to confrontation is waived where the issue was not preserved during trial and the facts presented demonstrate that the statements were properly admissible under ER 803(a)(4).

4. Whether sufficient evidence supported convictions for sexual abuse of D.D. where the combination of statements

admitted under RCW 9A.44.120 and ER 803(a)(4), combined with photographs and other witness statements supported the jury's verdict in a light most favorable to the State.

B. STATEMENT OF THE CASE

The appellant, Jeffrey Antee, was charged with three counts of rape of a child in the first degree, one count of child molestation in the first degree, one count of assault of a child in the first degree, and two counts of assault of a child in the third degree. CP 359-362. The charges were based on multiple assaults of Antee's then four-year-old stepchild, D.D. CP 1-3.

1. Child Hearsay Hearing.

Prior to trial, the State sought admission of statements made by D.D. under the child hearsay statute, RCW 9A.44.120. CP 22-38. The defense responded by filing a Motion to Challenge Competency and Child Hearsay. CP 40-69. The State then filed supplemental briefing addressing competency. CP 70-73. The trial court considered the issues in a pretrial hearing.

1RP 14.¹ D.D. testified at the evidentiary hearing. 1RP 18. D.D. indicated answered questions in a manner indicating that she understood the difference between the truth and a lie and acknowledged that she promised to tell the truth. 1RP 19-20.

When asked about Antee in the courtroom, D.D. initially testified that she didn't "want to talk about it." 1RP 20-21. She later acknowledged that she knew Antee and that she called him "Jeffie." She also described him as "mean." 1RP 23. When the prosecutor asked, "did someone hurt you?" D.D. responded, "Jeff. Only Jeffie." 1RP 23. She later described him holding her upside down and said, "he bonked my head." 1RP 24. She indicated that she got an "owie" from that and that people took pictures of the "owie." 1RP 24. She then indicated "He didn't

¹ There are several volumes of verbatim report of proceedings in this matter. Volumes 1-6 reported by Court Reporter Ralph Beswick contain portions of the jury trial and several pretrial hearings and are sequentially paginated, 1-1090. Those volumes are collectively referred to herein as 1RP. A volume containing portions of the jury trial, including closing arguments on June 29, 2021, reported by Court reporter Cheri Davidson, is referenced herein as 2RP.

do anything else.” 1RP 24. In response to follow up questions, she indicated that Antee was “angry” when he bonked her ear. 1RP 25.

Laurel Howdeshell Antee, D.D.’s mother, testified that she met Antee in April of 2017. 1RP 35-36. Howdeshell and Antee were married September 25, 2017. 1RP 36.² She indicated that Antee and D.D. “got along pretty well,” but “she was scared of his authority.” 1RP 36. Howdeshell said that D.D. started acting “really weird,” and started having “really bad outbursts.” 1RP 37. She said that D.D. would “start freaking out (sic) out of nowhere and cry and became extremely clingy” to her. 1RP 37.

D.D. had been mostly potty trained at age three but started having accidents on her bedroom floor or wetting the bed. 1RP 37. Howdeshell indicated that D.D. told her that she was “scared to go potty.” 1RP 37. Howdeshell testified that she, D.D. and

² Because Laurel Howdeshell Antee and the Appellant share the same last name, Laurel Howdeshell Antee is referenced as Howdeshell. By the time of trial, she went by Laurel Howdeshell.

Antee were living with her friend Lexie Wallace and law enforcement was called because D.D. had “a really big mark on the side of her head and her ear, and [Howdeshell] didn’t take her the hospital or the doctor right away.” 1RP 41.

Howdeshell indicated that D.D. had bruises on her legs, that she thought had come from D.D.’s birthday party at Charlie Safari, and “then the head injury happened where she had a mark on the side of her head,” which Howdeshell described as “across her ear and, like, a fingerprint-looking mark on her cheek.” 1RP 41. Howdeshell indicated the mark was “a little bit above her left temple and in her hairline but also on her forehead.” 1RP 42. Howdeshell said that D.D.’s “eyes were super swollen” and “she kept saying that Jeffie had put soap in her eyes.” 1RP 43.

Howdeshell also described speckle mark bruising on D.D.’s face, which Howdeshell testified “I thought she’d cried so hard that she popped the blood vessels in her face.” 1RP 45. When asked if D.D. gave an explanation for that, Howdeshell

testified, “No. She just told me that she was - - that she was really upset, that Jeffie made her really sad.” 1RP 45.

Howdeshell indicated that D.D. later told her what “he did,” indicating he “put his hands over her mouth when she was crying, and it wasn’t just her mouth. He would put his hands around her throat.” 1RP 45. Howdeshell testified “she had been in the car with him, and she had been crying really hard, and she told me that he reached behind and put his hands on her mouth.” 1RP 45. Howdeshell indicated that D.D. said “she couldn’t breathe when she was crying because he was trying to make her stop crying.” 1RP 46.

Howdeshell testified that D.D. eventually told her how she got the marks on her ear and the side of her head. 1RP 48.

Howdeshell testified

When I first had come home and my roommate saw the bruising she told me that she had slipped and fallen just like Jeff had said (sic) and hit her head on the corner of the wall by the bathroom. But she told me he lifted her upside down by her legs and swung her head into the wall.

1RP 48. Howdeshell indicated that D.D. told her that after she had gone to counseling. 1RP 48. When discussing a picture of the head injury, Howdeshell described it as a “goose egg” with “an outer bump that was raised.” 1RP 49.

Howdeshell testified that on the day of the head injury, February 6, 2018, Antee called her and told her that D.D. had fallen asleep in her car seat and he had picked her up and set her on the porch, but she fell and hit her shin. 1RP 50. Howdeshell indicated that she got home about “20 minutes” after the call, and testified

It was really quiet when I came inside. I didn’t know why. So I walked quietly down the hallway, and I heard what sounded like gagging from [D.D.]. And when I went into our room, he was holding her head and her face. He had his fingers in her mouth and he told me she was choking. At first I said ‘what the heck are you doing?’ He said ‘She’s choking.’ So I brought her to the bathroom. At this point Lexie came home, and she started freaking out because Jeff said she was choking on something. When I brought her to the toilet she said ‘Mommie, (sic) it doesn’t hurt any more (sic).’ And I checked in her throat and I didn’t see anything. We brought her into the bedroom and sat her on the bed, and that was when me and Lexis noticed the huge bruise on

her head and her ear, and we asked what happened, and Jeff said that he didn't know, that it must have been when she slipped when he went to get her a towel.

1RP 51-52.

Howdeshell stated that Antee told her that he had put D.D. in the shower because she had peed on him when he set her on the porch. 1RP 52. Howdeshell said that she did not remember D.D.'s hair being wet but noted that D.D. was in her underwear.

1RP 52. Howdeshell testified

So it was weird and (indiscernible) about her choking and what happened, we didn't even realize that her hair was dry until later on, and when we laid her on the bed she kept crying because her eyes were really, really red. She said Jeffie had put soap in her eyes ...

1RP 53. Howdeshell said that Antee told her that she must have got soap in her eyes in the shower and must have slipped and fell when he went to get her a towel. 1RP 53. She testified that when she asked D.D. about what happened, she said she slipped and fell and brought her over to the wall by the bathroom and said that she "hit her head right here." 1RP 54.

Howdeshell noticed that there was blood in D.D.'s mouth and indicated "he said that [D.D.] had bit him," but Antee would not show her the cut. 1RP 54. Howdeshell testified that after counseling, D.D. described things that Antee has done. 1RP 54.

Howdeshell indicated that she first noticed injuries on D.D. without explanation in November of 2017. 1RP 107. Howdeshell describe an injury to D.D.'s back, stating, "It was bruising, and it looked like a rug burn," and said that she had been with Antee before it and he told her that D.D. probably got it from playing. 1RP 107-108. Howdeshell indicated that shortly thereafter, she found blood in D.D.'s underwear. 1RP 108.

Howdeshell testified,

I came home from work, and I had brought her to the bathroom to go potty and she started peeing. She started screaming that her pee-pee was hurting and she was freaking out, bawling, crying. So I ran her back. I thought maybe she had a UTI. And when I went to go take her underwear off and noticed there was blood in her underwear so I made her a doctor's appointment. We brought her to the doctors and she didn't have a UTI and she didn't have a bladder infection and the doctor couldn't explain to me why there was blood in her

underwear, and [D.D.] didn't want to talk to me about it either.

1RP 110. Howdeshell indicated that she believed that was in December of 2017. 1RP 111.

Howdeshell testified that D.D. started talking to her about what Antee had done after she had a welfare checkup when Officer Wilson came. 1RP 113-114. While discussing the injury to D.D.'s head, Howdeshell testified that during a counseling session D.D. told her that "he held her upside down and swung her into the wall." 1RP 115-116. When asked about what D.D. said about sexual abuse, Howdeshell testified, "One of the incidences she said was that Jeff had used a spatula on her butt and her pee-pee and that he puts his pee-pee on her pee-pee and that it hurt, and she disclosed this obviously with the counselor in the room as well." 1RP 119.

Howdeshell further indicated, "She told me that's where the blood in her underwear came from. She also told me how Jeffie peed on her in the shower and it was yucky, and she told

me how he put his pee-pee in her mouth and it tasted like raspberries.” 1RP 119. Howdeshell indicated that was significant to her because there was one kind of lubricant in the home that she had used with Antee, and it was flavored “peach raspberry.” 1RP 119-120. Howdeshell indicated that D.D. had told her that “Jeffie came into her room when she was sleeping and got her out of bed and was mean to her, and she asked [Howdeshell] why [Howdeshell] didn’t make him stop.” 1RP 120.

Howdeshell also testified,

She sat me down very seriously one day and she randomly started talking to me in the bathroom about how he - - how there was - - he – Jeffie hurt her, like he was putting a knife in her tummy and her throat and it hurt, and she told me - - I remember the counselor told me that kids use code words. Like when she has nightmares she used to call Jeffie a monster and she would say the monster’s biting her back when she woke up from night terrors, and she disclosed the monster was Jeffie. She told me that a knife was in her tummy and her throat, and she later told me that it was from his - - she - - I asked if it was in reference to his pee-pee, and she said it was.

1RP 120-121.

Howdeshell also testified that D.D. had told her about a pen being put in her vagina. 1RP 122. She said that in mid-January, Antee called her at work to tell her that he had fallen asleep with D.D. and he woke up to her screaming. Howdeshell testified,

he said that he went to the bathroom and she had been using a broken pen on her vagina and she cut it, and when I got off and I went to go inspect her vagina I saw that there was like, a tear and there was blood, and she told me the same thing, that she used a pen on her pee-pee. She wouldn't even really talk to me about it at first, and then she just kind of, like, ignored me. I brought her to urgent care because, I mean, it scared me. I mean, she's never touched herself or anything. She's never been into her parts yet.

1RP 123. Howdeshell said that when she tried to get D.D. to talk to her about it, D.D. said "Jeffie was mean, and she didn't want to tell [Howdeshell] anything else." 1RP 123.

Howdeshell indicated that there was an incident when she was at work where Antee lost his cool with D.D. and there were welt marks on her butt of a handprint that left bruising

afterwards. 1RP 126. Howdeshell indicated that D.D. did not have incidents of sexualized behavior before she began living with Antee but began having such incidences after Antee joined the family. 1RP 126-127. Howdeshell also indicated that D.D. had developed anger issues since Antee began living with them. 1RP 129.

When asked if there were any other incidents that D.D. had told her about, Howdeshell testified,

She told me Jeffie put soap in her eyes when she was being bad. She told me he held her down, she couldn't breathe, and there are pictures of the petechia I think is what it's called on her eyes, around her eyes on her face. She told me how he held her under the bath water. She told me how he made her take a shower in the dark and how he put poop in her mouth when she was bad because she pooped her pants and that it tasted really bad, but then he gave her some water.

1RP 128-129.

At the end of the child hearsay hearing, Howdeshell was recalled as a witness and disclosed that D.D. knew that

Howdeshell was coming to court and asked her if “Jeffie was going to get in handcuffs.” 1RP 141. She testified,

I told her I’m going to go to court. She didn’t have to be there. Mommie’s (sic) just going to go. And she started to tell me that she was just kidding, that Jeffie wasn’t mean to her and he didn’t do anything and that she was just kidding. I got upset and asked her to stop talking about it. And then this morning she told me before court that Jeffie was mean to her and he’s going to go to jail in handcuffs.

1RP 141-142.

Lexie Wallace testified that she noticed a large red mark on the side of D.D.’s head that turned into a bruise later. 1RP 63. She said that she had gone to work and when she came home, D.D. was screaming and crying in the bathroom. 1RP 63. She indicated that D.D.’s hair was not wet as if she’d been in the shower. 1RP 64. She testified that “Howdeshell asked [D.D.] why Jeff was looking into her mouth because [D.D.] changed her mind and said she didn’t swallow anything, and when Howdeshell asked her why Jeff was looking in her mouth, she

said he wasn't," and that Wallace heard [D.D.] say that "he was looking in her pee-pee." 1RP 64.

She said that Antee looked at [D.D.] and told her not to lie, before Howdeshell laid [D.D.] down and Antee got [D.D.] ice cream. 1RP 64. Wallace reported the information to Howdeshell's sister and brother-in-law, and Child Protective Services was called. 1RP 64-65. Wallace testified that [D.D.] said that she hit her head on the wall and pointed to a spot on the door frame of the bathroom "maybe a foot and a half" higher than Wallace's knee. 1RP 65.

Officer Susanna Wilson of Chehalis Tribal law enforcement also testified at the child hearsay hearing. 1RP 67-68. Officer Wilson had previously worked for the Tenino Police Department. 1RP 68. Officer Wilson responded to check on D.D. on February 7, 2018. 1RP 69-70. When she arrived at the residence, she noted a strong odor of urine. When she looked at [D.D.] she noticed a large bump on the left side of her head by

her temple, that was blue in color and “about the size of a golf ball.” 1RP 70. Officer Wilson testified,

It looked like a cut in it. It also looked like she had a bruise on her left cheek that was about the size of an adult finger pad, I also noticed that the top of her left ear had petechia as well as there was petechia on her scull (sic) up above the ear.

1RP 70.

Officer Wilson also observed bruising on the back of D.D.’s legs on her upper thigh. 1RP 74. Officer Wilson described the bruises on D.D.’s legs stating,

One is on her right – right thigh. There’s a long bruise that goes just underneath her buttock for most of the length of the leg as well as a smaller bruise underneath that that is approximately the size of an adult finger pad. And on her left leg slightly lower down, but still on her thigh, there are two bruises which appear to be about the length of an adult finger pad as well as a longer line bruise below that more towards the back of the knee.

1RP 73-74.

Officer Wilson asked D.D. about her head and D.D. told her that “she had hit it on a wall.” 1RP 74. D.D. lead her to the door frame of the bathroom and pointed at about her head height

on it. 1RP 74. Officer Wilson later observed a forensic interview of D.D. 1RP 75.

During the forensic interview D.D. said that “Jeffie had held her - - held her nose and her mouth before and that she couldn’t breathe.” 1RP 75. She also indicated that he had pulled her hair by her ponytail before and had said sorry after he did that. 1RP 75. When the forensic interviewer showed D.D. pictures of her ear and her face and asked what happened to her ear, she said “that is where Jeffie had been holding her ear, and she said that she didn’t want him holding her there.” 1RP 76. When asked why he was doing that, D.D. said, “because he was mean.” 1RP 76.

Officer Wilson also observed D.D.’s statements made during a medical examination. 1RP 76. During the medical examination, D.D. said that “Jeffie’s pee-pee had gone into where her pee-pee was and that his pee-pee had also gone into her mouth and that they had tasted like raspberries.” 1RP 76-77.

The prosecutor had subpoenaed Nurse Lisa Wahl for the child hearsay hearing but released nurse Wahl from the subpoena when defense counsel indicated they would not be objecting to her testimony under as medical hearsay. 1RP 103. Defense counsel agreed with the state's recitation regarding the testimony on Ms. Wahl. 1RP 103. The prosecutor noted that she had discussed counseling records and the SANE nurse regarding medical hearsay with defense counsel and that she anticipated the counselor and indicated that she intended to call those witnesses at trial but not during the child hearsay hearing. 1RP 139.

During arguments, the prosecutor asked the trial court to find that the requirements of RCW 9A.44.120 were satisfied for the statements made by D.D. to her mother, Lexie Wallace and Officer Wilson, and asked the trial court to reserve with regard to Lisa Wahl and the Therapist Marilyn Miriam. 1RP 152. The trial court gave a detailed oral ruling on the issues raised. 1RP 160-171. With respect to D.D.'s competency to testify, the trial court discussed specific parts of D.D.'s testimony and applied the

Allen test for competency, finding that the testimony showed that D.D. was able to receive accurate information, that she was able to have an independent recollection of the occurrence of events, and that she “did have the ability to express in words her memory of the occurrence and the capacity to understand simple questions about it,” and therefore the trial court found that D.D. was competent as a witness. 1RP 160-163.

With regards to statements made by D.D., the trial court noted the distinction between child hearsay and excited utterance of medical exception hearsay and noted that the latter was discussed by the parties regarding the sexual assault nurse “Ms. Wahl.” 1RP 163.

The trial court then applied the factors from State v. Ryan, 103 Wn.2d 165, 691 P.2d 197 (1984), to the statements made by D.D. 1RP 164-171. The trial court indicated, “the court does not find that [D.D.] has an apparent motive to lie.” 1RP 164-165. The trial court indicated that Officer Wallace’s testimony indicated that [D.D.]’s general character was trustworthy. 1RP

165-166. The trial court noted that more than one person heard the statements. 1RP 166. The trial court discussed the spontaneity factor of the *Ryan* test and found that “the spontaneity factor is present for some of the statements, but not all of the statements.” 1RP 167. The trial court found that the timing of the statements weighed in favor of the trustworthiness of the statements. 1RP 167-168. The trial court noted that there were photographs documenting some of the alleged abuse and that the physical evidence is significant to the trial court when it considers issues of the indicia of reliability. 1RP 170-171.

After considering all of the factors, the trial court discussed the availability of D.D. testifying. The trial court indicated,

If the child was unavailable as a witness the statements may be admitted only if there is corroborative evidence of the act. Well, in this case [D.D.] did testify at the hearing, but there also is corroborative evidence of the alleged acts, and so the court is satisfied that weighing all of those pieces of testimony, weighing the exhibits, taking into account the demeanor and the way the witnesses testified, that all of those factors lead the

court to rule in favor of allowing the admissibility of [D.D.]’s statements under 9A.44.120 for the reasons that I’ve articulated.

1RP 171.

The trial court noted that the statements heard by Officer Wilson’s testimony were testimonial in nature but left it open for the defense to argue at trial regarding whether statements to Howdeshell, Wallace or Nurse Wahl were testimonial. 1RP 173-174. The trial court entered written findings of fact and conclusions of law consistent with its oral ruling. CP 99-104.

2. Trial Testimony.

At the time of trial, D.D. was seven years old. 1RP 573. D.D. testified that “Jeffy” was mean to her but indicated she did not know how to explain it. 1RP 576. When asked if Antee ever touched her body in a way that she didn’t like, D.D. indicated he had done so with a “spatula.” 1RP 576. When the prosecutor asked if there was anything else, she responded, “like a pen.” 1RP 576-577. When the prosecutor asked what he had done with the spatula, D.D. responded that he spanked her with it on her

“bum.” 1RP 577. She said that it was “kind of swollen” and it made her cry. 1RP 578. When asked what he had done with the pen, D.D. said that he stabbed her “bum.” 1RP 578.

She described being alone with “Jeffy” when that happened and indicated that she was “naked.” 1RP 580. She indicated that “it was really, really swollen.” 1RP 580. D.D. began responding, “no,” to several of the prosecutor’s questions before indicating “yes,” when asked if Antee had spanked her with a belt. 1RP 580-581. D.D. indicated she did not remember Antee putting his “pee-pee” in her “pee-pee,” and did not remember his “pee-pee” going into her mouth, stating, “that never happened.” 1RP 583. When asked if she remembered telling people that it tasted like raspberries, D.D. said, “That never happened either.” 1RP 583.

The prosecutor then asked if D.D. had talked to her counselor Marilyn and D.D. indicated she had told her counselor the truth. 1RP 584. D.D. also indicated that she told her mom

the truth and that she remembered seeing a Lady named Lisa who checked out her body and she told Lisa the truth. 1RP 584.

During cross examination, D.D. indicated that she remembered talking to a police officer when she was four years old. 1RP 590. D.D. also described the belt she had been spanked with as a long, brown belt. 1RP 591. Defense counsel asked D.D., “has Jeffy ever touched your pee-pee,” and D.D. responded, “no.” 1RP 595. Counsel asked, “has he ever put his pee-pee in your mouth,” and D.D. responded, “no.” 1RP 595.

Following D.D.’s testimony, Officer Wilson testified. 1RP 601-602. Officer Wilson indicated that she responded to a residence in Tenino on February 7, 2018, to conduct a welfare check of D.D. 1RP 604-605. Officer Wilson indicated,

I noticed there was a bruise about the size of a golf ball on her left temple. It looked to have a small cut in it. There was also a bruise on her left cheek that appeared to be the size of about an adult thumb pad, and she also had in looking (sic) at the more of the side of her head to see how far back the bruise on her temple went I saw that there was petechia on the top of her left ear and her scull (sic) above her left ear.

1RP 605-606. Officer Wilson indicated that D.D. told her that she got the bruise on her head when she fell into the wall. 1RP 606. Officer Wilson indicated that D.D. showed her a spot “about head height” on the bathroom door frame where D.D. said her head hit. 1RP 606.

Officer Wilson photographed the injuries that she observed, and the photos were admitted as Exhibits 39-42. 1RP 607-608. In addition to the “golf ball” size bruise on D.D.’s head, Officer Wilson described a bruise on D.D.’s right arm, and petechia on top of her ear and on her skull above her ear. 1RP 609-610. Additional photographs, admitted as Exhibits 38 and 43, showed bruising on D.D.’s left leg that had the appearance of two adult finger pads and a longer “sweeping bruise underneath that on her left leg,” and a “long sweeping bruise on her right leg just below her buttocks” with “another bruise about the shape and size of an adult finger pad slightly below that.” 1RP 613-614.

Officer Wilson indicated that due to the irregular injuries, she arranged for D.D. to be seen by a forensic interviewer and for a medical examination. 1RP 611. During cross examination, the defense inquired about Officer Wilson watching the forensic interview of D.D. that occurred at Monarch Advocacy Center. 1RP 622-623. Officer Wilson confirmed that during the forensic interview, D.D. did not disclose sexual abuse. 1RP 623. On re-direct, Officer Wilson indicated that D.D. made disclosures of physical abuse during the interview. 1RP 625.

Howdeshell testified that Antee was her ex-husband and that he daughter D.D. called him "Jeffy." 1RP 630-631. She indicated that she met Antee when D.D. was three. 1RP 632. Howdeshell indicated that Antee started staying with her continuously and occasionally started to provide childcare for D.D. 1RP 633-634. Howdeshell and Antee were married on September 25, 2017. 1RP 636. Howdeshell indicated that when she was at work, D.D. would either be at daycare or Antee would

have her. 1RP 637. She indicated that they moved to her friend Lexie's house, in Tenino, in January of 2018. 1RP 638, 640.

Howdeshell indicated that law enforcement came to the residence on February 7, 2018, because her brother-in-law and sister wanted a well-child check on D.D. 1RP 640. She indicated that on February 6, 2018, she had been working and got a phone call from Antee, during which he told her that D.D. had peed on him and that she had slipped and hit her shin going inside. 1RP 640-641. When Howdeshell arrived at the residence she indicated that it was quiet, but she could hear gagging noises from the bedroom. 1RP 642. She went to the bathroom and described,

Jeff was holding [D.D.] around like her head with her body draped against his knee. She was in her underwear, and he was, like, holding a finger in her mouth. He was in shorts with no shirt and I asked what was, like, (sic)the heck was going on and he said she was choking.

1RP 642.

Howdeshell indicated that she grabbed D.D. and brought her over to the toilet, but D.D. was not choking. 1RP 643. She testified that D.D. told her, "It's okay, mommie (sic). It doesn't hurt any more." (sic) 1RP 643. She indicated that her roommate Lexie got home at that time and she and Lexie sat D.D. on the bed. 1RP 643. She indicated "[D.D.] wouldn't stop crying because she said she - - her eyes were burning, and that's when we noticed she had a really big bruise and lump on the side of her head and her ear and her cheek." 1RP 644. She said that she asked D.D. what happened, and D.D. at first said, "I don't know," but then said that she slipped and hit her head. 1RP 644.

When Howdeshell asked D.D. why her eyes were burning, D.D. said "Jeffy put soap in her eyes." 1RP 644. Howdesell testified that D.D. did not say that she had been choking that night but later told her that "Jeffy put his pee-pee in her mouth." 1RP 645.

Howdeshell indicated that on February 6, 2018, she was pretty sure that Antee told her he had rinsed D.D. off in the

shower, but her hair was dry when Howdeshell got home. 1RP 645. When she looked in D.D.'s mouth, she noticed blood and testified that Antee told her that D.D. had bit his finger but would not let her look at his hand to see the cut. 1RP 645-646. Howdeshell indicated that D.D. had a bruise, which she described as a "goose egg" into her hairline with a red welt across her ear and a thumbprint on her cheek. 1RP 646. Howdeshell photographed the injuries and the photos were admitted at trial as Exhibits 14 and 36. 1RP 646-647.

Howdeshell testified that the bruising got worse overnight, and she took additional photographs on February 7, 2018, which showed bruising on D.D.'s face and top of her head, as well as petechia around her eyes and the side of her face. 1RP 650. Those photos were admitted as Exhibits 20, 33, and 35. 1RP 650-651. Howdeshell indicated that when child protective services (CPS) removed D.D. on February 7, 2018, Antee told her, "If you are a good girl, we'll take you to the jump place," at least three times. 1RP 652.

After D.D. had been removed by CPS and was no longer living with Antee, Howdeshell indicated that D.D. began to make disclosures about what Antee had done. 1RP 653-655. Howdeshell recounted things that had occurred while Antee was living with D.D. D.D. experienced a regression in potty-training and would pee on her floor instead of going to the bathroom. 1RP 656. On one occasion, D.D. started screaming when she went to go pee and Howdeshell noticed that there was blood in her underwear. 1RP 656-657. Howdeshell noted that after Antee began living with them, D.D. did not like taking showers anymore. 1RP 657.

When asked about blood in D.D.'s underwear, Howdeshell indicated that it happened "a couple of times" and she photographed the blood in "December or January," but noted it might have been November. 1RP 658. A photograph of blood in D.D. underwear was admitted as Exhibit 18. 1RP 658-659. When D.D. began therapy, Howdeshell testified that she disclosed that the blood in the underwear occurred because,

“Jeffy put his pee-pee on her pee-pee.” 1RP 659-660. She clarified that D.D. had said “in her pee-pee.” 1RP 660. There was no objection to this testimony. 1RP 660.

Howdeshell discussed a different incident where she had taken D.D. to Mary Bridge Children’s Hospital as a result of cuts that D.D. had on her vagina. 1RP 660. Howdeshell testified that Antee told her that he had fell asleep and woke up to D.D. screaming and he went into the bathroom and she was using a broken pen on her vagina and cut herself that way. 1RP 661. Howdeshell indicated that happened on January 24, 2018. 1RP 661. Howdeshell testified that D.D. did not disclose sexual abuse at that time, but after therapy D.D. told her that “Jeffy had been mean to her.” 1RP 662. Howdeshell photographed the injuries from January 24, 2018, and the photos were admitted at trial as Exhibits 16 and 17. 1RP 662-663. Howdeshell indicated that prior to Antee becoming part of their lives, D.D. had not displayed any sexualized behavior. 1RP 664-665. She indicated

that Antee told her about sexualized things that D.D. had done including playing with herself with crayons. 1RP 665.

Howdeshell described an incident of physical abuse that she had discussed with Antee after D.D. had welts on her butt that turned into bruises with his hand. 1RP 666-667.

When asked about what D.D. had disclosed regarding sexual abuse, Howdeshell testified, “She’s told me about when he had her on the couch at Rico’s and put her pee-pee - - his pee-pee on her pee-pee, and I’m not exactly - - I can’t remember if it was ‘on’ or ‘in,’ what she said,” and indicated that was the incident that D.D. said caused blood on her underwear. 1RP 668. Howdeshell continued, “She’s told me about when he used a spatula on her butt and on her pee-pee and in her pee-pee. She’s told me - - she brought me into the bathroom and wanted to tell me about a knife that was in her tummy and in her mouth and about Jeffy peeing on her.” 1RP 668. She clarified that when asked D.D. clarified that the knife was his “pee-pee.” 1RP 669. D.D. also told Howdeshell that Antee put his “pee-pee” in her

mouth and it tasted like raspberries, which was significant to Howdeshell because she indicated that she and Antee had peach raspberry flavored lube for oral sex. 1RP 669-670.

Howdeshell also testified that D.D. indicated that Antee told her not to talk about the sexual abuse and had indicated that she would get in trouble if she did. 1RP 671. After therapy, D.D. told Howdeshell that Antee had picked her up, upside down and swung her into the wall when she received the golf-ball-sized knot on her forehead. 1RP 672-673.

Howdeshell testified that she took a video of D.D. talking about what “Jeffy” had done to her in August of 2018. 1RP 674. The video was admitted as Exhibit 49 at trial, without objection. 1RP 676-677.

Counselor Marilyn Yearian testified that she is a licensed mental health counselor. 1RP 730-731. She indicated that she was a “private practitioner primarily specializing in children and adolescents.” 1RP 731. She described her job, stating,

So my job involves trying to be able to be a listening ear for kids and working alongside their parents to help support them in developing better relationships with friends and family members, supporting academic goals and trying to help them do well in school and trying to help them process difficult things that may have happened in their life circumstances, whether it's grief or trauma or other things that happen in life.

1RP 731.

Yearian indicated that identifying the abuser is important in planning treatment and therapeutic interventions. 1RP 738.

She testified,

I need to be able to understand the relationship that the child had with the person, with the abuser. For myself I need to understand as the treating provider what happened. For the child they need to understand what happened. Sometimes that's not exactly clear to them, especially with young kids because they don't really understand the complexities of what happened and why.

1RP 739. She indicated that knowing information regarding power dynamics helps her develop treatment goals or interventions. 1RP 739.

Yearian provided therapy to D.D. from April 24, 2018 through May 20, 2019. 1RP 741. Yearian described D.D.'s presentment and indicated that D.D. described "Jeffy" as a monster. 1RP 743-744. She indicated that on June 21, 2018, D.D. drew a picture of a monster and told her "Jeffy was mean to me." 1RP 746. On July 19, 2018, D.D. disclosed that "Jeffy touched my private parts," but said that she did not want to say anything else about that. 1RP 747. In a session on July 24, 2018, D.D. told Yearian that "Jeffy put her head in the toilet, plugged her nose and covered her mouth." 1RP 750-751.

On August 2nd, 2018, Yearian indicated that she met with D.D. and D.D. said, "Jeffy put his pee-pee in my mouth," and also said that he put poop in her mouth. 1RP 754-755. On August 9, 2018, Yearian noted that D.D. said, "Jeffy put his pee-pee in my mouth" and also "Jeffy put his pee-pee all over my face." 1RP 755. Yearian said that D.D. drew a picture of "Jeffy's mean face" and then his penis going all over the place, that was mostly scribbles. 1RP 755. On August 23, 2018, Yearian

indicated that D.D. expressed that she was afraid that she would get in more trouble with Jeff for telling her mom what he was doing to her. 1RP 756.

Yearian indicated that on September 27, 2018, D.D. disclosed that “Jeffy used a spatula on her private parts and put the spatula in her pee-pee.” 1RP 758. Yearian indicated that she asked D.D. if he had put his penis in her pee-pee and “she said yes, and that it hurt.” 1RP 758-759. D.D. expanded on that and said that it happened a lot on a bed and on a couch, and then disclosed that “Jeffy hit her head on the wall.” 1RP 759. During a session on October 4, 2018, Yearian indicated that D.D. shared that she felt “sad and would cross her legs where Jeffy touched her private parts.” 1RP 761. D.D. said, “I was sad because Jeffy was mean to me, put my head into the wall and hurt me.” 1RP 761. During a session on October 11, 2018, Yearian indicated that D.D. reported that she still had both good dreams about Jeffy and bad dreams about Jeffy. 1RP 761-762. D.D. then disclosed,

“Jeffy also put his butt on me and rubbed it around,” and “Jeffy put his penis in my pee-pee and it hurt.” 1RP 762.

During a therapy session on November 8, 2018, Yearian indicated that D.D. did a fake phone call to Jeffy and told him, “stop being mean to me. Don’t put your pee-pee in my pee-pee again.” 1RP 763. Yearian indicated that on November 29, 2018, D.D. reported that she doesn’t feel scared anymore and doesn’t think about Jeffy much. 1RP 764. On March 28, 2019, D.D. drew a picture of “angry Jeffy” and a different picture that she called “my face and Jeffy’s penis.” 1RP 765. There was no objection to any of the statements made by D.D. that Yearian testified to. 1RP 730-765.

Lexis Wallace testified that she heard Antee tell D.D., “You don’t tattle on Jeffy.” 1RP 808. She relayed her observations of the incident where D.D. “supposedly ate something in the shower.” 1RP 809-810. She indicated that she asked D.D. why Jeff was looking in her mouth and D.D. said, “he wasn’t looking into my mouth, he was looking in my pee-

pee.” 1RP 810. She said that Antee responded in a stern voice and said, “Don’t lie about that.” 1RP 810-811. Wallace indicated that Antee told her that D.D. was sleeping in the car and he was carrying her inside and she started to pee on him, so he sat her down on the front porch and “she must have not been all the way awake because she fell and hit her head on the porch.” 1RP 811. Wallace indicated that Antee later changed his story and said that D.D. fell, slipped in the shower and hit her head. 1RP 812. She indicated that D.D. said that she “hit her head on the wall because of Jeffy.” 1RP 814.

Advanced Registered Nurse Practitioner Lisa Wahl conducted a medical evaluation of D.D. at Monarch Children’s Justice and Advocacy Center. 1RP 829-830, Wahl indicated that her job generally involves assessing, diagnosing, and treating patients. 1RP 829. Wahl evaluated D.D. when she was four years old on February 21, 2018. 1RP 833. Wahl talked to D.D. about her body in a head-to-toe direction. 1RP 836. Wahl stated,

When I'm asking her how she was today and going downward she was fine, and then we talked about what had happened to her, and she talked about how her - - her butt got hurt and that Jeffy pulled her hair, and it wasn't the head that hurt but it was her ponytail that got hurt, and then she described how he's mean to her, and I asked her what that meant, and she was able to describe how he put his pee-pee in her mouth, and that she - - it tasted like raspberries, and that he put his hand on her pee-pee, and she said that when he was doing that he was being mean to her.

1RP 836. There was no objection to this testimony. Wahl testified that the physical examination of D.D. showed "in general she was a healthy young child." 1RP 839-840. Wahl made medical recommendations for follow up care including a referral to mental health counseling. 1RP 842.

Howdeshell's sister, Jasmine Wilson, indicated that there was an incident where Antee had struck D.D. 1RP 893. She testified that she was in the kitchen and D.D. and Antee were on the couch, and she heard a really large smack and hysterical crying. 1RP 893. Antee told her he spanked D.D. because she said he was choking her, and was lying, "so he spanked her bare

butt.” 1RP 893. Wilson described the smack leaving a huge welt in the form of a handprint. 1RP 893. Wilson indicated this happened when D.D. was only three and a half. 1RP 893. Wilson indicated that the spanking incident happened in October of 2017. 1RP 898-900. Jasmine Wilson’s husband Luke Wilson described the incident stating,

I was walking out of the living room at this point and into the kitchen where my wife was. And then I heard [D.D.] say “Stop. You’re choking me,” and then I heard, “Don’t lie, [D.D.],” and then a big, big smack. So at that point me and my wife both ran into the living room to see [D.D.], like just freaking out, crying super hard.

1RP 938. Luke Wilson indicated that Antee said that D.D. had lied about being choked so he hit her. 1RP 938.

3. Verdict and Sentence.

The jury found Antee not guilty of rape of a child in the first degree as charged in count one, guilty of rape of a child in the first degree as charged in count two, guilty of rape of a child in the first degree as charged in count three, guilty of child molestation in the first degree as charged in count four, guilty of

assault of a child in the second degree as charged in count five, not guilty of the crime of assault of a child in the third degree as charged in count six, and guilty of the crime of assault of a child in the third degree as charged in count seven. 1RP 1012-1013; CP 367-375. The jury found D.D. and Antee were family or household members at the time of commission of count five. CP 372. In a bifurcated proceeding, the jury returned special verdicts indicating that Antee used a position of trust, confidence, or fiduciary responsibility to facilitate the crime in counts two, three, four, five, and seven. 1RP 1047-1050; CP 431-440.

The trial court imposed an exceptional sentence of 434 months to life on counts two and three, 198 months to life on count four, 116 months on count five and 16 months on count seven. 1RP 1085-1086; CP 543-560, 495-506. This appeal follows.

C. ARGUMENT

1. The trial court did not abuse its discretion or violate the right to confrontation by admitting statements pursuant to the child hearsay statute, RCW 9A.44.120.

The United States Supreme Court has recognized the challenges inherent in sex abuse prosecution, and the emotional stakes for the child when the accused is a close family member:

Child abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim. A child's feelings of vulnerability and guilt and his or her unwillingness to come forward are particularly acute when the abuser is a parent.

Pennsylvania v. Ritchie, 480 U.S. 39, 60, 107 S. Ct. 989, 94 L.Ed.2d 40 (1987).

RCW 9A.44.120 provides: Admissibility of child's statement- conditions.

A statement made by a child when under the age of ten describing any act of sexual contact with or on the child by another or describing any attempted act of sexual contact with or on the child by another, not otherwise admissible by statute or court rule, is admissible in evidence in dependency proceedings under Title 13 and criminal proceedings, including juvenile offense

adjudications, in the courts of the state of Washington if:

- (1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
- (2) the child either: testifies at the proceedings; or is unavailable as a witness; PROVIDED, that when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

The statute allows the child victim's statement to be introduced only if the court finds sufficient indicia of reliability.

State v. Leavitt, 111 Wn.2d 66, 758 P.2d 982 (1988). The court must consider the guarantees of trustworthiness after considering the time, content, and circumstances of the statement. State v. Ryan, 103 Wn.2d 165, 691 P.2d 197 (1984). The court should consider the following nine factors as set forth in State v. Ryan in its determination of the reliability of the child victim's statement. *Id.* at 176-177.

Not every factor listed in Ryan needs to be satisfied before a court will find a child's hearsay statements reliable under the

child victim hearsay statute. State v. Swan, 114 Wn.2d 613, 652, 790 P.2d 610 (1990). No single factor is decisive. State v. Young, 62 Wn. App. 895, 902, 802 P.2d 829 (1991). Nothing in the statute requires that the statement be spontaneous. Thus, a statement that is otherwise admissible under the statute is not rendered inadmissible by the passage of time, counseling, or other circumstances that eliminate the element of spontaneity. State v. Carlson, 61 Wn. App. 865, 812 P.2d 536 (1991).

If the child is incompetent to testify at the time of trial, the court may declare the child unavailable under RCW 9A.44.120, which necessitates an analysis of corroboration. In State v. C.J., 148 Wn.2d 672, 684, 63 P.3d 765 (2003), the Court wrote “[i]t is clear from the statute’s plain language that the legislature did not intend to exclude the hearsay statements of a child who is incompetent to testify, so long as the statute’s requirements of reliability and corroboration are satisfied.”

Corroborative evidence can take many forms. It is evidence “that which would support a logical and reasonable

inference that the act of abuse described in the hearsay statement occurred.” *Id.* at 687. “In many child abuse cases, there is no physical evidence of harm, nor any eyewitnesses, so the corroboration requirement may be satisfied by both direct and indirect evidence.” *Id.*

Direct corroborating evidence may include medical evidence of abuse. State v. C.J., at 687. Indirect corroborating evidence may include the child victim’s precocious knowledge of sexual activity. *Id.* In State v. Jones, 112 Wn.2d 488, 772 P.2d 496 (1989), the court found that the record did not reveal any other way in which the victim could have learned of specific unusual sexual acts described in the victim’s out-of-court statement. In some cases, cross-corroboration is said to exist when the stories of two young victims closely parallel each other, thereby supporting the reasonable inference that the described abuse did occur. State v. Swan, 114 Wn.2d 613, 619, 790 P.2d 610 (1990).

In this case, the trial court made specific findings following the Ryan factors. 1RP 164-171. The trial court noted both that D.D. was anticipated to testify at trial and that there was evidence corroborating the statements that the State sought to admit. 1RP 171. The trial court stated, “Well, in this case, D.D. did testify at the hearing, but there also is corroborative evidence of the alleged acts” when it ruled in favor of admissibility of the statements. 1RP 171. A trial court’s ruling on the admissibility of statements under RCW 9A.44.120 is reviewed for abuse of discretion. State v. Beadle, 173 Wn.2d 97, 111-112, 265 P.3d 863 (2011). Because only the trial court has the opportunity to see and evaluate the child and other witnesses, it is in the best position to determine the reliability of child hearsay statements. State v. Pham, 75 Wn. App. 626, 631, 879 P.2d 321 (1994). As such, “the trial court is necessarily vested with considerable discretion in evaluating the indicia of reliability.” State v. C.J. at 686.

Here, Antee does not argue that the trial court abused its discretion by finding that the statements were admissible at the initial child hearsay hearing, but rather argues that because D.D. was found competent to testify, the statements should not have been admitted because D.D.'s testimony at trial was insufficient to satisfy the Confrontation Clause. Antee's reliance on State v. Rohrich, 132 Wn.2d 472, 939 P.2d 697 (1997) for this proposition is misplaced.

In State v. Clark, 139 Wn.2d 152, 159-160, 985 P.2d 377 (1999), the defendant made a similar argument to that which Antee makes here citing to Rohrich. The Clark Court noted that in Rohrich, the State called an alleged victim and asked her only innocuous background questions and failed to ask her about the alleged sexual abuse and the victim was not cross examined. Clark at 160. The Court noted that the facts in Clark were distinguishable from Rohrich, noting that the State asked the victim about the alleged acts and she denied they occurred and the State asked about the prior hearsay statements and the victim

indicated that they were lies in the Clark case. Clark, at 161. The Court noted that on that record, Clark had a full opportunity to cross examine the victim about the alleged acts and about hearsay statements, therefore the admission of the statements did not violate the Confrontation Clause. *Id.* at 161.

In State v. Price, 158 Wn.2d 630, 146 P.3d 1183 (2006), our State Supreme Court again considered whether a child's testimony was sufficient to support admission of hearsay statements under the Confrontation Clause. The Court noted that the prosecution asked the victim about the underlying events and the contents of the victims statements to her mother and a detective, and while the victim did not adopt her prior statements on the stand or recant, the Court found that there was no effort to shield the child from responding to questions as had occurred in Rohrich. Price, at 648. The Court noted that "the Confrontation Clause guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Id.* at 648,

citing United States v. Owens, 484 U.S. 554, 559, 108 S.Ct. 838, 98 L.Ed. 2d 951 (1988). The Price Court held, “all of the purposes of the Confrontation Clause are satisfied even when a witness answers that he or she is unable to recall.” Price, at 650.

Here, the prosecutor asked D.D. specific questions about the underlying allegations and the statements that she had previously made. 1RP 573-584. Similar to Clark and Price, the prosecution did not shield D.D. from cross examination. The fact she did not adopt her previous statements did not deprive the defense of the opportunity to cross examine her or otherwise render the pretrial statements inadmissible. It was for the jurors to “have the opportunity to evaluate whether they believe the child forgot or whether she was evading for some other reason,” the right to confrontation was satisfied. State v. Kinzle, 181 Wn. App. 774, 784, 326 P.3d 870 (2014).

The trial court did not abuse its discretion by admitting statements under RCW 9A.44.120 and the admission of those statements did not violate the right to confrontation under the

circumstances of this case. Even if D.D.'s testimony at trial could somehow be construed as making her unavailable at trial to testify, the trial court properly found that the facts presented corroborated the statements. That finding was supported by the testimony including, the photographs admitted during both the child hearsay hearing and the trial, Antee's own statements regarding a pen causing injuries, and testimony about D.D.'s sexualized behavior. There was no error in the application of the child hearsay statute or the admission of statements under the statute.

2. Antee made no argument that statements were testimonial and there were no testimonial statements relied upon at trial, therefore, there can be no Confrontation Clause violation.

A Sixth Amendment Confrontation Clause objection must be raised at or before trial or is waived. State v. O'Cain, 169 Wn. App. 228, 279 P.3d 926 (2012); State v. Burns, 192 Wn.2d 190, 208-209, 438 P.3d 1183 (2019); Melindez-Dias v. Massachusetts, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed2d 314

(2009). In O’Cain, the defendant did not object under Confrontation Clause analysis to statements made for the purpose of obtaining medical treatment the Court held that the defendant could not obtain relief under the Sixth Amendment or Article I, § 22 of the Washington State Constitution. *Id.* at 232. In Burns, our State Supreme Court noted where a defendant fails to object, “nothing the trial court does or fails to do is a denial of the right, and if there is no denial of a right, there is no error by the trial court, manifest or otherwise, that an appellate court can review.” Burns, at 211, citing State v. Fraser, 170 Wn. App. 13, 25-26, 282 P.3d 152 (2012).

This analysis is more onerous than RAP 2.5, which generally states a reviewing Court will not consider an evidentiary issue that is raised for the first time on appeal because failure to object deprives the trial court of the opportunity to prevent or cure any error. RAP 2.5(a)(3); State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). There is a narrow exception to RAP 2.5, however, that exists for "manifest error[s]

affecting a constitutional right." RAP 2.5(a)(3); Kirkman, at 936. However, that exception does not apply to a failure to raise a confrontation claim. Burns, at 211-212.

Here, the trial court noted that statements that were heard by Officer Wilson during the forensic interview would be testimonial but left open any argument that other statements made by D.D. could be considered testimonial. 1RP 173-174. Following D.D.'s testimony at trial, no argument or objection regarding confrontation analysis was made or lodged. Any issue regarding confrontation was therefore waived by the failure to argue that statements were testimonial. Moreover, the statements elicited at trial regarding sexual abuse were not testimonial, therefore there can be no showing of error, let alone manifest constitutional error.

The Confrontation Clause is primarily concerned with testimonial statements. Crawford v. Washington, 541 U.S. 36, 51, 124 S.Ct. 1354, 158 L.Ed 177 (2004). If a statement is nontestimonial, it is not subject to the Confrontation Clause.

State v. Wilcoxon, 185 Wn.2d 324, 332, 373 P.3d 224 (2016); Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). D.D.’s statements made to her mother, Lisa Wahl and Marilyn Yearian do not meet the definition of testimonial statements. They were not in the course of police interrogation and were not made in preparation for litigation. Statements are testimonial if the primary purpose of the questioning is to establish or prove past events potentially relevant to later criminal prosecution and circumstances, objectively indicate that there is no ongoing emergency. State v. Alvarez-Abrego, 154 Wn. App. 351, 363, 225 P.3d 396 (2010).

During trial, the State elicited child hearsay statements that were communicated from the child to her mother either in private conversation or as part of mental health therapy. These statements were not for the purpose of establishing facts for a criminal prosecution and are not testimonial. The statement elicited from Lexie Wallace, in which D.D. indicated that Antee was “looking in [her] pee-pee” was also made under

circumstances which were nontestimonial. 1RP 810. The statements made to Yearian and Wahl were made for the primary purpose of medical diagnosis and treatment, not for litigation and were therefore also non-testimonial.

The only potential testimonial statements made by D.D. were to the forensic interviewer and viewed by Officer Wilson. However, during trial, Officer Wilson did not provide any statements from D.D. that were related to sexual abuse. 1RP 622-623. In fact, the defense elicited testimony from Officer Wilson indicating that there was not a disclosure of sexual abuse during the forensic interview. 1RP 623. Simply put, none of the child hearsay, or ER 803(a)(4) hearsay statements that were admitted during trial were testimonial. There can be no Confrontation Clause violation.

3. Antee waived any Confrontation Clause argument with regard to statements made to Yearian and Wahl by failing to object to those statements and even if not waived, the statements were properly admissible under ER 803(a)(4).

As noted in the previous section, a Confrontation Clause argument is waived if it is not raised prior to or during trial. Burns, at 211. During the child hearsay hearing, the defense agreed that statements made by D.D. to Nurse Lisa Wahl during her medical evaluation of D.D. were properly admissible as “medical hearsay.” 1RP 103. The prosecutor noted that statements made to D.D.’s counselor would also be offered under that exception and therefore were not the subject of the child hearsay hearing. 1RP 139. No objection, either on hearsay or Confrontation Clause grounds was made to the testimony of either Nurse Wahl or Counselor Yearian. As such, any argument that the admission of those statements violated the Confrontation Clause was waived. The Court does not need to consider the manifest constitutional error standard of RAP 2.5. Burns, at 211.

Even if this Court applied RAP 2.5, for the reasons stated in the previous section, there can be no manifest constitutional error in the admission of the statements made for medical diagnoses, assessment and treatment as D.D.’s statements to

Yearian and Wahl were clearly nontestimonial and are therefore not subject to Confrontation Clause analysis. Any argument that the statements made to Wahl and Yearian were improperly admitted were clearly not preserved and should not be considered by this Court.

Had Antee properly objected to the admission of the statements made by Wahl and Yearian, they still would have been properly admitted under ER 803(a)(4). “Statements made for purposes of medical diagnosis or treatment and describing medical history, past or present symptoms, pain, or sensations, of the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment” are excluded from the hearsay rule whether the declarant is available or not. ER 803(a)(4). Statements made by a sexual assault victim during a medical evaluation qualify for admission under this exception. State v. Williams, 137 Wn. App. 736, 154 P.3d 322 (2007). Statements made by a child victim indicating that the abuser is a member of the victim’s immediate

household are reasonably pertinent to treatment. State v. Fisher, 130 Wn. App.1, 15, 108 P.3d 1262 (2005), *review denied*, State v. Fisher, 156 Wn.2d 1013 (2006).

A child's statements to a therapist are also independently admissible under ER 803(a)(4) where the therapist would have relied on the child's descriptions in determining the best course of treatment, which includes both the physical and emotional injuries that result from child abuse. In re Pers. Restraint of Grasso, 151 Wn.2d 1, 84 P.3d 859 (2004). It was proper for Antee to waive objection to admission of the statements that D.D. made to Yearian and Wahl for the purposes of medical and emotional treatment. Even if Antee had not waived any argument regarding the admission of the statements, there was no error in their admission.

4. In a light most favorable to the State, the evidence was sufficient to convict Antee of each count of sexual abuse.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational

trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Id.* Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In determining whether the necessary quantum of proof exists, the reviewing Court need not be convinced of the defendant’s guilt beyond a reasonable doubt, but only that substantial evidence supports the State’s case. State v. Galisia, 63 Wn. App. 833, 838, 822 P.2d 303 (1992). Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). A reviewing Court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

In considering a sufficiency challenge, the reviewing Court can consider all evidence, even evidence an Appellate Court determines was wrongly admitted. Lockhart v. Nelson, 488 U.S. 33, 40-41, 109 S. Ct. 285, 102 L. Ed. 2d 265 (1988). Here, D.D.'s statements to her mother, Nurse Wahl and Counselor Yearian were properly admitted under ER 803(a)(4) and RCW 9A.44.120. For all of the reasons included in the previous sections, there was no error in the admission of the statements provided. In addition to the statements of D.D. which were admitted, testimony from Howdeshell, Wallace, Jasmine Wilson and Luke Wilson, including their recitation of statements attributed to Antee corroborated the statements indicating that Antee sexually and physically abused D.D. Moreover, photographs were taken which corroborated the incidents and demonstrated injuries from both the pen incident and blood in D.D.'s underwear from the couch incident. Howdeshell corroborated the statements regarding raspberry flavoring

through her testimony that she and Antee used peach raspberry lubricant.

In a light most favorable to the State, the evidence was sufficient to support the jury's findings. Even if this Court were to find that portions of the evidence were improperly admitted, a sufficiency of the evidence claim considers even evidence that this Court determines was wrongly admitted. If this Court finds any evidentiary error, a proper remedy would be based on the particular error that is found, not in a sufficiency of the evidence claim for dismissal with prejudice.

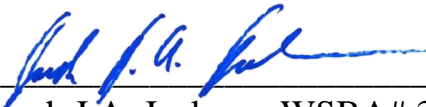
D. CONCLUSION

The trial court properly admitted statements made by D.D. under RCW 9A.44.120, and such admission did not violate the right to confrontation. Any confrontation claim based on either D.D.'s testimony at trial or ER 903(a)(4) was waived because no such claim was preserved during trial. Even if such a claim had been preserved, the statements elicited were non-testimonial and therefore not subject to Confrontation Clause analysis. For all of

the reasons stated herein, the evidence was sufficient to support Antee's convictions. The State respectfully requests that this Court affirm Antee's convictions and sentence.

I certify that this document contains 10919 words, not including those portions exempted from the word count, as counted by word processing software, in compliance with RAP 18.17.

Respectfully submitted this 26th day of July 2022.



Joseph J.A. Jackson, WSBA# 37306
Attorney for Respondent

DECLARATION OF SERVICE

I hereby certify that on the date indicated below I electronically filed the foregoing document with the Clerk of the Court of Appeals using the Appellate Courts' Portal utilized by the Washington State Court of Appeals, Division II, for Washington which will provide service of this document to the attorneys of record.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
Olympia, Washington.

Date: July 26, 2022

Signature: Stephanie Johnson

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

July 26, 2022 - 3:40 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 56122-1
Appellate Court Case Title: State of Washington, Respondent v Jeffrey Lee Antee, Appellant
Superior Court Case Number: 18-1-00331-1

The following documents have been uploaded:

- 561221_Briefs_20220726154003D2980604_5114.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Antee Jeffrey Brief of Respondent.pdf

A copy of the uploaded files will be sent to:

- marietrombley@comcast.net
- teri.bryant@lewiscountywa.gov
- valerie.marietrombley@gmail.com

Comments:

Sender Name: Stephanie Johnson - Email: stephanie.johnson@co.thurston.wa.us

Filing on Behalf of: Joseph James Anthony Jackson - Email: joseph.jackson@co.thurston.wa.us (Alternate Email: PAOAppeals@co.thurston.wa.us)

Address:
2000 Lakedrige Dr SW
Olympia, WA, 98502
Phone: (360) 786-5540

Note: The Filing Id is 20220726154003D2980604